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SUPREME COURT OF THE UNITED STATES
October Term 1972

No. _____

LOCALS 268 and 1130 of the
Brotherhood of Railroad Trainmen,
Petitioner,
v.

United States of America, Chesapeake
and Ohio Railway Company, Locals
362 and 1796 of the Brotherhood of
Railway and Steamship Clerks, Freight
Handlers, Express and Station Employees,
Respondents,

and

Locals 268 and 1130 of the Brotherhood
of Railway Trainmen,
Petitioners,
v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF
APPEALS

To The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Locals 268 and 1130 of the Brotherhood of Railroad Trainmen (now Locals 1307 and 1917 of the United Transportation Union) hereby petitions for a Writ of Certiorari to review the decision of the Fourth Circuit

Court of Appeals made on December 26, 1972.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' decision decided on December 26, 1972, and the District Court's opinion decided on August 24, 1971, are appended hereto in the appendix. The opinion of the Fourth Circuit has not yet been officially reported. The District Court's opinion was not officially reported.

JURISDICTION

The judgment sought to be reviewed was made by the Fourth Circuit Court of Appeals on December 26, 1972. No petition for rehearing was filed nor was there any extension granted to file this Petition for Certiorari. The Fourth Circuit Court of Appeals stayed its mandate on January 12, 1973, for 30 days to permit petitioner to file its application for a writ of certiorari. The statutory provision believed to confer jurisdiction on the Court to review the judgment in question is 28 U. S. C., Sec. 1254 (1). The District Court has jurisdiction pursuant to the provisions of 42 U. S. C. 2000e-et seq. commonly known as Title VII of the Civil Rights Act.

QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII of the Civil Rights Act permit the displacement of existing employees in granting remedial relief?

2. Can statistical evidence establish a

pattern or practice of intentional discrimination in hiring prior to 1964, and thereby justify the granting of remedial relief under Title VII of the Civil Rights Act?

3. Does the language in 42 U. S. C. 2000e-2(h) permitting an employer to maintain a bona fide seniority system cover seniority systems developed prior to July 2, 1965, and is Title VII of the Civil Rights Act to be applied retroactively?

4. Should seniority in a particular job that requires an individual to work in, prior to advancement to the next level job which is not an entry level job, be used as the determinative factor to ascertain a person's place on the roster at the next level job when he is bidding against a member of an excluded class for a future vacancy?

STATUTE INVOLVED

The Statute involved is the equal employment opportunity chapter of the Civil Rights Act found in 42 U. S. C. 2000e-et seq. The provisions of this chapter that are directly involved include:

42 U. S. C. 2000e-2

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's

race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. . .

(c) It shall be an unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of section . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. 2000e-6

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an

application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

STATEMENT OF THE CASE

A. Statement of Material Proceedings

On October 17, 1968, the United States Government filed a complaint in the United States District Court--Newport News Division against the Chesapeake and Ohio Railway (hereinafter referred to as the C&O), Locals 268 and 1130 of the Brotherhood of Railroad Trainmen (the Brotherhood of Railroad Trainmen later became the United Transportation Union) (hereinafter referred to as Locals 268 and 1130), and Locals 362 and 1796 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as Locals 362 and 1796), alleging violation of Title VII of the Civil Rights Act of 1964. All defendants alleged compliance with Title VII and specifically denied that any discrimination existed and stated that any differences that may have resulted arose out of a bona fide seniority system and as the result of different classifications of parties and different operating agreements and requirements.

The District Court after a lengthy hearing, found there was no discrimination in hiring and assignment since the passage of the Act and

further found that there was no discrimination in hiring and assignment prior to the passage of the Civil Rights Act. The District Court did provide some remedial relief (See opinion in App.). The Government noted its appeal. Locals 268 and 1130 appealed from the provision of the District Court's decree that provided if a Barney Yard man and a General Yard man pass the conductor's exam on the same day, their seniority on the yard conductor's roster would be determined by their company seniority. On appeal, the Fourth Circuit Court of Appeals found there was discrimination in pre-Act hiring and ordered broad remedial relief to overcome the present affects of past discrimination. The Court concluded that the pre-Act discrimination against black Barney Yard men had present affects and held that Barney Yard brakemen could use their company seniority to bid on vacancies in the General Yard, including those caused by furloughs. The Court also ruled that Barney Yard brakemen who passed the conductor's exam could bid for vacancies for yard conductor. In the event that bidding for a yard conductor's vacancy was between two Barney Yard men or a Barney Yard man and a Yard brakeman, the job would be awarded to the person with the longest company seniority, but if there were only Yard brakemen bidding, then the Yard brakeman with the longest seniority on the yard conductor's roster, and not company seniority would prevail. Finally, the Court of Appeals permitted inter-craft relief by permitting Barney Yard men and Group III Clerks employed before the Civil Rights Act to bid on vacancies in the General Yard and in

Group I and II Clerks based upon their company seniority.

The parties will be referred to as indicated and all page references will be made to the printed record used in the Court of Appeals, except where reference is made to the appendix in this Petition.

B. Hiring In The General Yard and Barney Yard

The suit by the Government in reference to Locals 268 and 1130 involved alleged discrimination by the locals and the C&O in the hiring and assignment of railroad employees at the Barney Yard and General Yard at the C&O's terminal in Newport News.

The evidence showed that the C&O last hired men in the General Yard and Barney Yard in 1957 (621, 637, 638). The C&O began hiring again in 1970, and there was never any finding by any Court that there was any post-Act discrimination in hiring and assignment. Prior to 1964, the date of the passage of the Civil Rights Act, the records did show that all Barney Yard men were black and all men in the General Yard were white (172, 824). Local 268 had jurisdiction over brakemen and yard conductors in the General Yard, while 1130 had jurisdiction over all men in the Barney Yard (982). Locals 268 and 1130 were organized by craft (983), and a person's assignment to a local depended upon his craft and not his race (994).

The uncontradicted evidence indicated that the men in the Barney Yard first worked for an

independent contractor until the C&O built Pier 9 in 1914 (210). At that time Barney Yard men were not getting paid as much as the men in the General Yard and formed the Barney Yard Committee to represent their interests (215). The United States Railroad Administration, a Government Agency, took over the C&O in 1917 and operated it until 1920 (189). While the Government was in control, the Barney Yard Committee successfully negotiated an agreement on June 1, 1918 providing that Barney Yard riders would be paid the same as yard brakemen (223), and that the seniority rights of the men in the Barney Yard and General Yard would be separate and distinct (223). The Barney Yard Committee continued to represent the men in the Barney Yard until 1959 when Local 1130 was chartered (123). The agreement negotiated between the C&O and the Brotherhood of Railroad Trainmen continued to reflect the practices of the earlier Government agreement and authorized the maintenance of separate and distinct rosters for the Barney Yard and General Yard.

Once the Barney Yard men were successful in negotiating separate and distinct rosters, they adopted a procedure of hiring. The Barney Yard Committee would always ask the most senior men if they wanted to recommend anyone (129). The recommended friend or relative would then be interviewed by the assistant superintendent of the coal piers and would be hired if there was a vacancy and if he met the qualifications (129, 130, 598). Several men testified in detail that they were hired as a result of a friend's recommendation (83, 264). A similar procedure

was followed in the General Yard except the trainmaster interviewed the applicants (598). All men hired in the Barney Yard worked initially as Barney Yard riders, and all men hired in the General Yard were hired as yard brakemen.

There was no evidence at any time showing any overt act of discrimination. Application for jobs at the C&O was standard with every applicant taking a physical examination and a police check (597). The application form was free of racial designation (C&O Exhibit 3).

C. Comparison of Make-Up And Wages Of Barney Yard and General Yard

Separate seniority rosters were maintained in the General Yard and the Barney Yard (240), and Barney Yard men could not bid for jobs in the General Yard, and General Yard men could not bid for jobs in the Barney Yard (233, 234).

Lines of progression were followed in both the Barney Yard and General Yard. A man employed in the Barney Yard first worked as a brakeman, and then could qualify for foreman or car retarder operator (97). Promotion from Barney Yard brakeman to foreman and car retarder operator was by seniority provided the man was qualified (93). Some of the men in the Barney Yard were not qualified for foreman because of lack of education (98) or knowledge (99). No tests were required for promotion. Only one seniority roster was maintained in the Barney Yard (122), and some men in the Barney Yard could work the job of brakeman, foreman

and car retarder operator in the same month (134).

In the General Yard a brakeman was eligible for promotion to yard conductor. Promotion to conductor required at least three years of experience in the Yard (808), and passage of a written test. Brakemen seeking promotion to yard conductor would have to be fully familiar with the operating rules, including both yard and road service (783, 784). Conductors were determined by need and every man on the conductor's roster had passed the conductor's exam (812). A yard brakeman's seniority on the conductor's roster was determined by the date he passed the exam except if two or more Yard brakemen passed the exam on the same day, then their seniority between them would be determined by their seniority on the Yard brakeman's roster.

There was no bidding for vacancies in the General Yard and Barney Yard. A vacancy was filled by the man who had the most seniority in the yard where the vacancy occurred (1594, 1595). A senior brakeman could displace anyone junior to him (1603). There were no job stabilization agreements and a furloughed man could not carry his seniority to other places of employment.

The brakemen in the Barney Yard were paid the same wages as Yard brakemen (87). Foremen in the Barney Yard were paid the same as conductors in the Yard (87). There was a conductor for each crew in the General Yard, and a foreman for each crew in the Barney

Yard (94, 95). The Barney Yard also employed at least three car retarder operators per shift who had no counterpart in the Yard and were paid more than anyone in the Yard (87, 91, 94, 95).

D. Comparison Of Work In Barney Yard and General Yard

The men employed in the Barney Yard were responsible for taking loaded coal cars to either Pier 14 or 15, where they were dumped and then returned to the empty yard (86, 87). No engines were used, as the cars moved by gravity (142). The loaded cars were started off by a "teaser" who initiated momentum through a jack-like device (88). The brakeman then rode the loaded car to the "mule pit" using the hand brake on the side of the car to control speed (86). The "mule" (a remote controlled power device), then took the car to the dumper where the coal was dumped (86). The coal was dumped mechanically with the empty car being kicked back to the empty yard by a machine called a "goat" (87).

The car retarder operator was responsible for kicking the cars and also automatically aligned the switches to make sure that the empties went into the appropriate return track (87). The Barney Yard foreman supervised the crew and made sure that the proper cars were taken to the mule pit (93, 795). The Barney Yard men worked in a confined area where a number of tracks converged to one on each pier (101).

The work in the Yard differed substantially from the work in the Barney Yard. The men in

the Barney Yard did not have to know signals (783), while the men in the Yard had to know signals for both the Yard and road service (783). The men in the Yard did not work in a particular area, but over a large area (167), covering four yards (170). The men in the Yard had to be familiar with the operating rules for both the Yard and road service, signalling, flagging, and the classification and order of trains (177, 178, 783, 784, 785). The brakemen in the General Yard also had to know how to read classification signals (789), derail targets and lights (789), time tables (789), speed limits, and understand the meaning of lights at crossings. General Yard men, in addition to knowing the operating rules and regulations, had to know and qualify on the motor rules, radio rules, and switching instructions (789, 794). Barney Yard men did not have to qualify under these rules (792). The men in the Barney Yard generally rode cars down an incline (794), while men in the Yard worked with engines at various yards, and engaged in classification, switching (making up and breaking down trains), transfer work (moving cars from one part of the yard to another), and industrial switching (71).

REASONS FOR GRANTING WRIT

No cases interpretating the provisions of Title VII of the Civil Rights Act have permitted the displacement of existing white employees by blacks in order to afford remedial relief. The Courts in the decisions of United States v. St. Louis, San Francisco Ry. Co. 464 F. 2d 301 (8th Cir. 1972), cert. denied January 8, 1973, and United States v. Jacksonville Terminal 451 F. 2d 418 (5th Cir. 1971) cert. denied 406 U.S. 906 (1972)

and Local 189 v. United States 416 F. 2d 980 (5th Cir. 1969) cert. denied 397 U. S. 919 (1970) only permitted the excluded class to bid on vacancies as jobs became available and referred to new job openings. It is settled that qualified Negroes with greater seniority cannot displace incumbent workers. See United States v. Hayes International Corp. 456 F. 2d 112 (5th Cir. 1972). Here the Court has ordered that Barney Yard brakemen employed before the passage of the Civil Rights Act can use their company seniority to fill General Yard vacancies, including those caused by furloughs.[1] (Italics Ours). At the C&O Terminal in Newport News, regularly employed Yard brakemen are often furloughed for short periods for various reasons, including miner's vacations or strikes. If Ralph Reighard, a Yard brakeman with a date of hire of March 20, 1947, was holding a regular brakeman's job and was furloughed, he could not get his job back if any one of approximately thrity-four Barney Yard men who have dates of hire or seniority greater than Reighard decided to take the job when the job became available again. (See C&O Exhibits 10, 13, 29, 34). If a Barney Yard man took the vacancy caused by the furlough, there would then be a vacancy in the Barney Yard which could only be filled by a junior Barney Yard man. Reighard could not exercise his seniority for the vacancy created by the Barney Yard man who left his job to take the job in the General Yard. Although Reighard could displace

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[1] A furlough cannot cause a vacancy, but it is apparent that the Court meant that a vacancy occurred when a job was recalled after a furlough.

any other regular brakeman with less seniority, the end result would be the displacement of one less General Yard man employed in the General Yard. The effect is that a white incumbent worker has been bumped out of his present position by a black who has greater seniority, and a senior white could remain out of a job (on furlough) while a junior black (in terms of company seniority) is recalled to work. See Local 189 v. U.S. supra at 988.

It is also to be noted that the Circuit Court of Appeals' finding of pre-Act discrimination here was based upon statistics not found to be rebutted. The Fifth Circuit Court of Appeals in United States v. Jacksonville Terminal supra at 441, remarked that statistics do not establish a prima facie case of discrimination. Locals 268 and 1130 submit that the language in Title VII of the Civil Rights Act requiring a pattern or practice of intentional discrimination is not met by showing statistics of pre-Act employment where the alleged excluded class successfully negotiated with the U.S. Government separate seniority and then perpetuated the separate seniority by adopting a procedure of hiring that insured their status. Those cases in other Circuits using statistics to establish discrimination have had ample supportive facts to negate any attempt to undermine the reasonableness of the statistics drawn. See United States v. Jacksonville Terminal Company supra. and United States v. St. Louis, San Francisco Ry. supra. where in addition to statistics there was either post-Act discrimination, written agreements precluding the hiring of black employees, or where there were overt acts of discrimination. See

Parham v. Southwestern Bell Telephone 433 F. 2d 421 (8th Cir. 1970), where in addition to statistics there was post-Act discrimination and the placement of blacks in lower paying, menial jobs. See Jones v. Lee Way Motor Freight 431 F. 2d 254 (10th Cir. 1970) where in addition to statistics the company overtly practiced post-Act discrimination. See Griggs v. Duke Power Company 420 F. 2d 1255 (4th Cir. 1970) reversed in part 401 U. S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1970) where the trial court found as a matter of fact, discrimination in hiring and assignment.

Locals 268 and 1130 also submit that the language of Title VII permitting an employer to maintain a bona fide seniority system notwithstanding any other provision of the Act (See 42 U. S. C. Sec. 2000e-2(h)), and the intent of Congress (See the remarks of Senators Clark and Case, 110 Congressional Record 6992) show that Title VII should have only a prospective application and since there was no post-Act discrimination, there was no need to reform the seniority system. Here the General Yard men and Barney Yard men acquired their present position and seniority rights at a time when it was not an unlawful employment practice to maintain separate and distinct seniority rosters. Here the Circuit Court, by reforming the seniority and no transfer provisions by allowing Barney Yard men and Group III Clerks to exercise their company seniority for all future vacancies, has retroactively applied the provisions of Title VII of the Civil Rights Act.

Finally, the Circuit Court has refused to allow a General Yard man to use his Yard seniority as a determinative factor when competing with a Barney Yard man for a position on the Yard conductor's roster. The position of yard conductor is not an entry level job. It is to be noted that the Eighth Circuit Court of Appeals refused to allow train porters (the excluded class) to use their full company seniority in bidding on future vacancies in freight braking jobs. See United States v. St. Louis San Francisco Railway Company supra. The uncontradicted evidence showed that the skills and experience gained by the men in the Barney Yard at any level cannot be equated with the skills and experience gained in the General Yard because of the functional and classification differences in the two yards, and the day-to-day experience gained from working in the General Yard. The Court in allowing Barney Yard men with no experience in the General Yard to use their company seniority to determine a Barney Yard brakeman's position on the yard conductor's roster is in effect giving Barney Yard men super-seniority in violation of Title VII of the Civil Rights Act.

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

Raymond H. Strople

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Locals 268 and 1130 of the Brotherhood of Railroad Trainmen v. United States of America, et als, were deposited in the United States mails, first class, to the Solicitor General, Department of Justice, Washington, D. C. 20530; to Richard S. Weil, Attorney, Department of Justice, Washington, D. C. 20520, counsel of record for United States of America; to Joseph B. Geyer, 2 North Charles Street, Baltimore, Maryland 21201, counsel of record for the C&O; and to James L. Highsaw, Jr., Suite 506, 1015 Eighteenth Street, N.W., Washington, D. C. 20036, counsel of record for Locals 362 and 1796, on the 24th day of January, 1973. It is further stated that the Petition has been served on all parties.

Raymond H. Strople

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CIVIL ACTION NO. 1469-NN

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, et al.,

Defendants.

(Judgment Entered August 24, 1971)

MEMORANDUM OPINION

Averring violations of Section 707 of Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. § 2000e-6), and of Executive Order No. 11246 (and its predecessor No. 10925), the United States, as plaintiff, here proceeds against the Chesapeake and Ohio Railway Company, and four Union Locals. In brief, it is alleged that the Railroad is engaged in acts and practices that discriminate against its Negro employees in their enjoyment of equal employment opportunities and that the Union Locals are in complicity with these alleged violations. Organizational segregation is likewise laid to the unions.

Parties

Specifically, the defendants are:

Chesapeake and Ohio Railway Company (hereinafter referred to as "C&O"), which operates a railway terminal at Newport News, Virginia, in connection with its business of the interstate transportation of coal and general merchandise. It is also agreed that C&O hauls mail and commodities under contract with the United States.

Local Lodge 268, Brotherhood of Railway Trainmen (hereinafter referred to as "BRT 268"), to which belong the brakemen and conductors employed by C&O in the General Classification Yard in the terminal at Newport News.

Local Lodge 1130, Brotherhood of Railroad Trainmen (hereinafter referred to as "BRT 1130"), to which belong the brakemen, foremen and car retarder operators employed by C&O, exclusively in the coal handling facility at the Newport News terminal known as the Barney Yard.

Local Lodge 362, Brotherhood of Railway Airline and Steamship Clerks (hereinafter referred to as "BRAC 362"), to which belong Group 1 and Group 2, Clerks, employees of C&O in the terminal at Newport News.

Local Lodge 1796, Brotherhood of Railway, Airline and Steamship Clerks (hereinafter referred to as "BRAC 1796"), to which belong Group 1, Group 2 and Group 3, Clerks, employees of C&O in the terminal at Newport News.

Contentions

The plaintiff contends that prior to the effective date of the Civil Rights Act of 1964, July 2, 1965, and thereafter, the C&O, on the basis of race, assigned white employees, as brakemen, to the General Classification Yard, and Negro employees, as brakemen, to the Barney Yard; that the duties in the two Yard categories are similar and require the same qualifications, skills and training. The wages are the same.

Further, it is charged that brakemen in the General Classification Yard may seek promotion to Yard Conductor, Yardmaster, and General Yardmaster. Barney Yard brakemen may rise

only to positions of Foreman and Car Retarder Operators in the Barney Yard. Seniority, fixed by date of employment, is not transferrable from one yard to the other. Thus, according to the Government, the Negro brakeman in the Barney Yard is "locked in" to a less desirable job ladder with no chance for promotion to Yard Conductor, Yardmaster, etc.

Discrimination by race in employment in the General Classification Yard and Barney Yard is reflected, charges the Government, in the two segregated BRT locals to which such employees belong. General Classification Yard Brakemen and Conductors are members of BRT 268 whose membership of 176 was entirely white on January 1, 1970. Barney Yard Brakemen, Foremen and Car Retarder Operators belong to BRT 1130 whose roster of 85 active members on January 1, 1970, was all black. Such organizational segregation, the Government charges, is a violation of Title VII.

In the C&O clerical force at its Newport News Terminal, the Government contends that white employees only are assigned to Group 1 and Group 2, Clerks' Transportation, positions, and blacks mainly to Group 3, Transportation, jobs without equal accesses to Group 1 and 2 jobs. In addition, white clerks all belong to BRAC 362, the roster of which numbers 243. Group 1, 2 and 3 employees, who are black, belong to BRAC 1796, the roster of which numbers 182. This segregation is charged to be a violation of Title VII.

Further, the Government contends that an "Employment Qualification Form B" test which the C&O instituted for promotion beginning in January, 1966, does not predict job performance, disqualifies a greater percentage of blacks than whites, is violative of the Civil Rights Act, and, as an aside, is also contrary to specific provisions of the collective bargaining agreements between the C&O and BRT and BRAC.

* *

The C&O responds to the charge of racial bias by showing the background and history of its hiring practices. What is now its Barney Yard Operation for exporting coal, until 1914 was handled by a labor force of an independent contractor. Upon the construction of Coal Pier 9 in 1914, C&O took over the entire coal loading process as a company operation, including as its own employees, the Negro laborers then on the job. These Negroes, seeking to improve their work standards and wages, on June 1, 1918, formed a "Barney Yard Committee" which negotiated with C&O (1) that Barney Yard car riders would be thereafter paid at the same rate as the General Classification Yard brakemen and (2) that seniority rights of Barney Yard men and General Yard men would be separate and distinct. This agreement of June 1, 1918, made while the United States Government was operating the C&O, remained in effect until April 1, 1959. After April 1, 1959, Barney Yard brakemen petitioned for and became members of a local lodge of BRT, which thereafter negotiated the collective bargaining agreement for the Group and which agreement retains the separate seniority roster.

The C&O therefore contends that through April 1, 1959, the Barney Yard men operated under the Barney Yard Agreement which they negotiated for and pertains to its own craft and skill. Thereafter, Barney Yard brakemen were included in BRT collective bargaining agreements which make no reference to and do not discriminate with regard to race.

The C&O contends, moreover, that the work in the General Classification Yard and the Barney Yard is not similar. A Barney Yard brakeman, says C&O, is a car rider who releases brakes and applies brakes on a loaded coal car moving by gravity down a slight grade from the storage "hump" to the coal dumping area. No knowledge of signals, rules, train layouts, exchanges, routings, etc. are required. The Railroad's evidence is that General Classification Yard brakemen are involved in a far more sophisticated operation in moving cars using locomotives, making up trains, giving hand signals, etc.

C&O urges with emphasis, relying upon Section 703(h) of the Civil Rights Act, 42 U. S. C. A. §200e-2(h), that such minor existing preferences, distinctions and differences as may exist between its employees (whatever their race) are derivatives of a bona fide seniority system established under lawful collective bargaining agreements mandated bythe Railway Labor Act through National Mediation Board Orders.

* *

As to Groups 1, 2 and 3 Clerks, the C&O maintains that the craft and groupings were established in 1918, and are not designed, intended

or effective as racially discriminatory. Since 1918 clerks have fallen into three groups.

Pier laborers were not a part of any craft until a National Mediation Board Order in 1936 certified as a "clerical class," to be included in Group 3, the laborers at stations and the merchandise piers at Newport News. Thus, says C&O, the classification of laborers as "Group 3 Clerks," was directed by the Government's own National Mediation Board under the Railway Labor Act. These employees are eligible for promotion to Group 1 and 2, some have so progressed, but generally have difficulty qualifying.

The "EQ Form B" test to which plaintiff objects, is, according to the C&O, a test culminating from ten years of study at C&O, devised and validated by professional industrial psychologists. Its object is non-discriminatory, but instead is a planned part of a new progressive approach by C&O towards upgrading its hiring practices.

Finally, says C&O, it has taken every affirmative action possible, beginning before 1964, towards compliance with the Civil Rights Act, including active recruitment, within its labor force, and without, to secure qualified Negro employees in all areas of work.

* *

BRAC Locals 362 and 1796 maintain that they are not segregated on basis of race; that blacks and whites may belong to either lodge; that as locals they do not negotiate collective bargaining agreements with the C&O, but that

such bargaining is done by BRAC system wide and nationwide as authorized by the National Mediation Board.

Members of Locals 362 and 1796 are governed in this employment with C&O by agreements between BRAC and C&O as to rates of pay, rules, working conditions, and the designation of craft or class as determined by the National Mediation Board under Section 2 of the Railway Labor Act (45 U. S. C. §152).

BRAC contends further that the job classifications in Groups 1, 2 and 3 Clerks, originated at a time (1918) when the United States Government was administering the railroads, and were based upon work performed and not race. Work performed is still the test, says BRAC, and not race. The division of employees on the C&O into separate crafts and classes was made pursuant to the Railway Labor Act and the negotiation of collective bargaining agreements for each such craft or class is required by the Railway Labor Act.

Specifically, Locals 362 and 1796 point out that neither of its locals operates a hiring hall or job referral service and neither participates in any way in the hiring of any employee by the C&O or in the initial assignment of a newly hired employee to a job. Neither of these Locals maintains any seniority list.

* *

Locals 268 and 1130 BRT contend that the nature of the work performed by the members

of the two locals is not similar; that the locals are not separated on the basis of race; that the two locals are mutually beneficial and members are not deprived of employment opportunities.

They further contend that the Newport News Locals do not represent the members in collective bargaining negotiations with the C&O; do not maintain any seniority lists; do not hire or fire or assign positions; and do not operate any hiring hall or referral system.

BRT Locals have a large degree of local autonomy in their social aspects and have chosen to remain apart--a decision made by vote of each lodge.

FINDINGS OF FACT

(1) The C&O is in interstate railroad employing 24,195 persons. A part of its operation is a terminal at Newport News, Virginia. The terminal encompasses (a) a General Glassification Yard through which passes all freight in any category, coal included, and (b) a special yard, termed the "Barney Yard", which rehandles only coal for export by sea. At the waterside of the terminal are merchandise piers for import and export purposes of general cargo, and special coal piers whose sole purpose is the export of vast tonnages of coal.

(2) The C&O employment at the Newport News Terminal reflects the decline in railroad employment nationwide and totals now 1000 persons, down from 1600 in better years. Hiring is decentralized and is the responsibility of the

affected department. The employees at the Terminal are union members and belong to and are represented by local lodges of labor organizations which are designated and authorized by the National Mediation Board, a federal agency, pursuant to the Railway Labor Act (45 U. S. C. A. §152, Ninth) originally passed by Congress in 1926. That Railway Labor Act (45 U. S. C. A. §152, Fourth) and its predecessor General Order 27 also is responsible for the division of the C&O employees (and all railroad employees, everywhere) into crafts and classes for the purpose of such union representation, much of which was set up in 1918.

(3) While the National Mediation Board has designated some 17 unions to represent different crafts and classes of C&O employees, for the purposes of this suit, the court is only concerned with two, namely: The Brotherhood of Railroad Trainmen (BRT),* and the Brotherhood of Railway and Airline Clerks, Freight Handlers, Express and Station Employees (BRAC). The certification of these unions by the National Mediation Board for employee representation is system wide and covers the craft or class wherever located on the C&O.

(4) Among the employees of C&O are a substantial number of clerical, office, station and stores employees. As a craft or class, they are represented by BRAC which has negotiated for them a collective bargaining agreement with C&O. This system wide agreement covers the employees of the clerical craft, as enlarged by law to include terminal laborers, at Newport

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*Redesignated now as United Transportation Union

News Terminal.

(5) Among the employees of C&O are a substantial number of operating railroad personnel, such as engineermen, firemen, brakemen, and trainmen. The scope of the crafts or classes of such employees is likewise determined by the National Mediation Board under authority of the Railway Labor Act. On a system wide basis, The Brotherhood of Railway Trainmen represents all operating employees. The General Classification Yard brakemen and Barney Yard brakemen of concern in this suit constitute two different crafts within the BRT. At Newport News, these brakemen are members of two locals of BRT, namely, Local 268 and Local 1130.

(6) As earlier stated, the complaint here filed by the United States on October 17, 1968, proceeds against the C&O, both BRT locals and both BRAC locals, charging (a) racial discrimination in hiring practices and segregated unions in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. §2000e, et seq.) and (b) interference, through acts of discrimination, with the performance of government contracts, in violation of Presidential Order 11246.

Counsel for the United States has agreed that it was not seeking greater remedial relief against C&O under the Executive Order than the relief it sought under Title VII. **

We conclude that the obligations under the Executive Order are encompassed in the more specific commands of Congress within the terms

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** Hearing November 4, 1969, Tr., p. 14.

of Title VII of the Civil Rights Act. The suit has proceeded on this theory, and the conclusions herein are considered by this court as applicable to both claims.

(7) At the outset, the court finds, from an examination of the complaint and the answers by the Government to interrogatories, that the discrimination which triggers this proceeding is limited to blacks employed only in the crafts whose locals were named as defendants, Group 1, 2 and 3 Clerks, Transportation, Barney Yard brakemen and General Classification Yard brakemen. The union locals which constitute the only defendants other than the C&O are the locals affecting only these classes and crafts of employees.

An effort to enlarge the suit by adding 15 additional labor organizations and locals as parties was instituted after the suit had already proceeded through sixteen months of laborious discovery. The motion to enlarge came on only three months before the final pre-trial conference and trial, which dates had been long established on the calendar. That motion to enlarge by adding parties was denied.

The court finds as a fact that the inter-craft ramifications of the Government's final argument and proposals which would cut across all craft lines at the Newport News Terminal, involving many unions, did not surface as a part of the relief sought by the Government until July, 1970, a scant sixty days before trial began, and nearly two years after the complaint was filed. In the intervening twenty-two months, it was the Government's position that it sought only intra-craft

relief involving Negroes in Group 1, 2 and 3 Clerks, Transportation Department, and inter-craft relief as to Negro Barney Yardmen in the General Clissification Yard service. Accordingly, no other inter-craft relief will be considered. Relief across craft lines, otherwise requested by the Government is not appropriate, was not timely requested, and the necessary and indispensible parties for such relief are not now before this court.

(8) Having reviewed and made the foregoing findings reflecting the division of the C&O employees into crafts and classes, their union representation and the general collective bargaining procedure, we proceed to other parts of this case.

(a) BRT, representing both General Classification Yard brakemen and Barney Yard brakemen, maintain two locals at Newport News to which such C&O employees may belong. BRT Local 268 is comprised of 193 members and on January 4, 1970 all were white. BRT 1130 is comprised of 164 members and on January 1, 1970 all were black. Such organizational segregation is suspect as violative of the Civil Rights Act. Certain changes will be solicited.

(b) BRAC, representing Groups 1, 2 and 3 clerks of C&O, maintains two locals at Newport News to which such employees may belong. BRAC Local 362 is comprised of 305 members, all Group 1 and 2 clerks, and as of January 1, 1970, 301 were white and 4 were black. BRAC Local 1796 is comprised of 162 members of Group 1, 2, and 3 Clerks, Transportation Department, and as of January 1, 1970, 158 were black and 4 were white. Such organizational segregation is suspect as violative of the Civil

Rights Act and certain changes will be solicited.

(9) Examining initially the C&O's hiring practices with regard to brakemen in the General Classification Yard and the Barney Yard, the court finds as a fact that for eight years prior to the effective date of Title VII of the Civil Rights Act, until January 1, 1970, i.e., for thirteen years, from 1957 until 1970, no new employees were hired in either yard. Therefore, any past pattern or practice of prior discrimination in yard hiring chargeable to C&O at the time this suit was filed in October, 1968, must have occurred prior to 1957. Of course, hirings in the General Classification Yard and Barney Yard are also subject to the court's scrutiny for the nine months period from January 1, 1970, when employment was reactivated, until September 21, 1970, the date trial began.

As to the latter nine month period, since January 1, 1970, 43 persons have been approved for work in the Barney Yard. 23 are now so employed. Of these, 13 are black, 10 are white. No evidence of discrimination based upon race has been shown.

Since January 1, 1970, 89 persons have been approved for work in the General Classification Yard. 42 are now so employed. Of these, 32 are white, 15-20 are black. (Exact breakdown by race is unknown.)

The evidence does not preponderate to show discrimination based on race in the hiring of brakemen since at least 1957 to the present.

(10) For many years (to 1936) laborers were hired for work on the piers through a daily "shape-up" procedure, i. e., laborers seeking daily hire would report to the pier area and as many as were necessary for the day's activities would be hired on the spot. Following the National Mediation Board action (in 1936) classifying pier laborers as "Group 3 Clerks" the status of such laborers has been much, much more secure under wage agreements, seniority rights, etc. As to C&O hiring practice, in Group 1, 2 and 3 Clerks generally, it appears from the evidence that 15 new permanent employees have been hired since the advent of Title VII of the Civil Rights Act. All 15 have been placed in Group 1, which is the highest skill classification and so designated by the Railway Labor Act. Three of these employees are stenographers. There was ample testimony, statistical and from the Negro Chairman of BRAC Local 1796, that Negroes with sufficient background and skill to qualify them for Group 1 jobs were simply unavailable. Efforts were made by the Union and the C&O to seek such employees from the minority group. The court finds this to be a fact. Of the 15 employees placed in Group 1, 13 were white, 2 were black.

During the period 1962 through 1969, 25 extra employees have been hired, which have Group 1, 2 and 3 employment rights. 14 are Negroes.

No Group 3 hirings have occurred at the Newport News Terminal since 1964.

(11) The court concludes from the facts found in (¶10) that it has not been proved by a preponderance of the evidence that the C&O has been

guilty of discrimination based on race in the hiring of Group 1, 2 and 3 Clerks, Transportation, since, at least, 1964 to the present.

Evidence has been offered that prior to 1964, absent a specific job application in mind, an applicant for general employment would be guided to the merchandise pier where there was a turnover in the labor force. This location held out the greater likelihood of success for the job applicant. Such referrals, however, in our judgment do not prove by a preponderance of the evidence that C&O had embarked on a racially discriminating course, forbidding employment to Negroes in Groups 1 and 2 Clerks. Nor do isolated general statements by witnesses that they did not apply for Group 1 or 2 work because they thought blacks would not be so hired, or that some person had told them that a black would not be so hired, prove discrimination.

So also, the fact that few Group 3 Clerks, Transportation, have progressed to Groups 1 and 2, is not of itself, evidence of racial discrimination. As elsewhere commented upon, Group 3 Clerks, Transportation, were essentially pier laborers and have not measured up to the more exacting qualifications and skills required of office work.

(12) While we find no fatal discriminatory racial overtures in original hiring, we do find three elements of the bidding and transfer practice in Group 1, 2 and 3 Clerks, Transportation Department, which lend themselves to invidious discrimination. The evidence indicated that seniority rules do grant rights to a Group 3 Clerk, Transportation, to bid on Group 1 and 2 jobs in the Transportation Department, but (a) subject to the rights of holders of

Group 1 seniority in Newport News in other departments and (b) subject to preference to Group 2 and 3 employees in transportation and other departments having seniority prior to January 31, 1943, and (c) extra employees with employment dates prior to January 31, 1943. Certain changes respecting the progression restriction to Group 3 Clerks, Transportation, will be solicited.

(13) As to C&O hiring practices in the crafts of General Classification Yard brakemen and Barney Yard brakemen prior to 1957, the court finds as a fact that the crafts are not similar and represent an entirely different trade. The only similarity, and there it ends, is that both General Classification Yard brakemen and Barney Yard brakemen ride cars, and set and release hand brakes. In fact, Barney Yard men were known, until a short time ago, as "car riders". Undoubtedly, the move to upgrade the nomenclature and classify such "car riders" as "brakemen" has precipitated some of the difficulty here.

A General Classification Yard brakeman moves drafts of cars under the motive power of a locomotive, a power he controls with signals. It is a force which can move in both directions into and out of a complex of industrial trackage, yards, and stations. He must concern himself with the dangers which exist in front, to the rear, and on adjoining tracks, dangers which move both ways. He must know signals for daytime, by hand, and for night, by lantern. The rules by which he works, and which he must know, are complicated, involving crossings, switchings, inter-line transfers, etc. Braking, as such, is actually a minor part of his job.

On the other hand, a Barney Yard brakeman is concerned only with the slight force of gravity as the single car, or small cut of cars he controls, moves downgrade at a slow speed. A minor knowledge of signalling is all that is necessary, if any. Movement is in only one direction and mostly in brightly lighted yards. Few, if any, rules concern him.

(14) The C&O practice of hiring blacks as Barney Yard brakemen prior to 1957 is understandable. Only blacks applied for such employment. As a matter of fact, only blacks applied who, through family connections, knew of openings in the existing Barney Yard labor force. There was a considerable pride by blacks in railroad employment. The pay was equal to whites--and much, much better than the existing wage scale elsewhere.

We do not find invidious discrimination in C&O hiring practices at the Barney Yard when only blacks applied for employment. No substantial evidence has indicated any designed C&O employment practice that black applications for employment prior to 1957 were turned from other railroad employment and steered by the C&O to the Barney Yard. Only blacks applied at the Barney Yard, and only blacks were hired.

Employment of General Classification Yard brakemen, likewise has proceeded on the basis of hiring when a job opened. There is no evidence before the court that the C&O failed to hire, as a company practice or procedure, any black applicant at the General Classification Yard because of race. To assume such would be

rank speculation without any constructive basis. No blacks applied and none were hired.

We do find, however, that to a degree there is a discrimination in the avenues for promotion in the Barney Yard. The system does "lock in" such employees.

Certain procedures to allow Barney Yard brakemen to seek status as yard conductors, assistant yardmaster and yardmaster will be therefore solicited to eliminate the present non-accessibility of these last mentioned jobs to Barney Yard employees.

(15) The court, after viewing all of the exhibits and testing them against two weeks of testimony, specifically finds that the seniority system on the C&O is a bona fide seniority system, in fact, in truth, and within the meaning of Section 703(h) of the Civil Rights Act of 1964. The changes required elsewhere in this Memorandum Opinion will serve only to eliminate certain abrasive features thereof as they apply at the Newport News Terminal.

The seniority system in the C&O, and for that matter on every railroad in the United States, had its national origin in General Order 27 promulgated by the Government's Director General of Railroads in 1918. In the choice of the segments for groupings (clerks, trainmen, etc.) and the separate rosters established, little basic changes have occurred even until now. There are 50 such seniority rosters in C&O employment at the Newport News Terminal alone. There are nine

separate clerical rosters, divided into Groups 1, 2 and 3. New employees establish seniority on one of these rosters in accord with collective bargaining agreements in the employee's craft. These agreements are negotiated system wide--not just for a single area of the railroad, such as Newport News Terminal. After establishing that seniority, an employee, system wide (and nation-wide as to railroads generally) does not take that initial seniority date from one roster to another. The individual's "seniority" and its importance to him in insuring his job security presupposes and depends upon jurisdictional boundaries. Such boundaries in the railroad industry are always craft boundaries. For an individual, black or white, to have as his seniority date his date of original employment as such to be made applicable to all crafts would be to offer no job protection whatsoever except on a vertical basis on a role of 24,000 employees--which would result in havoc.

One hard fact upon which every witness in this case agreed, no matter what his reason for appearance, and no matter where his interest lay, was that his seniority rights were the most important asset he owned "next to God and his family." A C&O employee hired today makes exactly the same salary as all other C&O employees now doing similar work, no matter when they were hired--5, 10, 15 years ago. But the senior employee has his "seniority date" which gives him preference as to lay-offs, rehiring, shifts--in other words, gives him job security.

Such seniority rosters are maintained without regard to race, and allegations by the Government that such separate rosters were kept on a racial

basis were without proof.

* *

CONCLUSIONS OF LAW

(1) The maintenance of separate BRAC Locals 362 and 1796 encompassing clerical employees, but one with black membership and one with white membership is a discrimination, invidious in its effect upon C&O employees. Such separate memberships are not a responsibility of C&O.

Parties will submit a plan within thirty (30) days from the date of this Memorandum Opinion, providing for the merger of these two locals, which plan will insure black representation for a period of five (5) years in such tender areas as grievance committees and other representation at the National convention of the United Transportation Union.

(2) The maintenance of separate BRT Locals 268 and 1130 encompassing two crafts in the brakemen area, but one with black membership and another with white membership, is a discrimination, invidious in its effect upon the employees. Such separate membership locals are not a responsibility of C&O which does not assign employees to unions.

Parties will submit a plan within thirty (30) days from the date of this Memorandum Opinion providing for the merger of these two locals, which plan will insure black representation for a period of five (5) years in such tender areas as grievance committees and other representation functions of the locals. The plan shall explore,

for a like period of five (5) years, some form of black representation at the national assembling of the United Transportation Union.

(3) The "EQ Form B" testing program which was initiated by C&O, we find to have been an affirmative effort by the railroad to upgrade employment policy, and not based in any effort to racially discriminate. The use of testing or measuring procedure can be useful and is not precluded ipso facto by the Civil Rights Act.

> "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Griggs v. Duke Power Company, 401 U.S. 424 (1971).

But, on such basis, the "EQ Form B" tests employed by the C&O have not been shown to be a measure of job performance, and as presently constituted and administered, shall be discontinued.

(4) Having stated elsewhere that restrictions on the bidding rights of Group 3, Clerks, Transportation, to jobs in Groups 1 and 2, Clerks, Transportation Department, are a violation of the Civil Rights Act, the parties will submit a plan within thirty (30) days from the date of the entry of this Memorandum Opinion, under which the bidding rights of Group 3, Clerks, Transportation, shall be secured to Group 1 and 2, Clerks, Transportation, jobs at Newport News. To be eliminated are the prior bidding rights given to others other than Group 3, Clerks, Transportation,

to bid on Group 1 and 2, Clerks, Transportation jobs.

(5) This court recognizes, and has so found as a matter of fact, that the work performed by General Classification Yard brakemen and Barney Yard brakemen is totally dissimilar but that a common bond in the term "brakemen" is applied in both categories.

While no discrimination is found by the court to be chargeable to the C&O in connection with the hiring practices and procedures in these two crafts, nevertheless, the existence of the two rosters will continue to create friction. The orderly elimination of this abrasive situation would be to the best interest of all concerned, securing, however, their present seniority to all employees now serving in the two yards. Just as original entry brakemen can be trained to their jobs and their progression thereafter in the General Classification Yard, so also should Barney Yard brakemen have access to such training and progression.

Parties therefore will present to the court within thirty (30) days from the date of this Memorandum Opinion a plan to "top and bottom" the existing seniority rosters of the General Classification Yard and the Barney Yard to become effective January 1, 1972, with new hirings on and after that date to be upon a single roster serving both yards.

It is recognized that greater capabilities and skills than are now required may be necessary

at the original entry level of employment and such plans as presented may want to probe this problem.

Yard conductors, assistant trainmasters, and trainmasters, are recruited by the C&O exclusively from qualified brakemen in the General Classification Yard. Barney Yard brakemen, conceding that their training and work experience does not presently qualify them for such promotions are thereby effectively denied this avenue to move ahead. To this extent it does appear that they are "locked in" to the three grades of brakemen, foremen, and car retarder operators. Adding this detraction to the racial make-up of the two yard crafts, while not found to be a literal discrimination by this court, nevertheless is a further point of chafing which ought to be eliminated. Bearing in mind that the qualifications for yard conductor, assistant trainmaster and trainmaster should not, in any wise be lowered, the parties are directed to present to the court within thirty (30) days from the date of this Memorandum Opinion a plan to become effective January 1, 1972, under which enterprising Barney Yard brakemen seeking to upgrade themselves and seek promotion to yard conductors, assistant trainmasters, and trainmasters, may qualify for selection to those job levels through an appropriate C&O administered on-the-job training program.

We find our decision entirely consonant with Quarles v. Philip Morris, Incorporated 279 F. Supp. 505 (D. C. E. D. Va. 1968) and with Local 189, United Papermakers and Paperworkers v. United States, 416 F. 2d 980 (5th Cir. 1969). Indeed, with the

relief which we have ordered, much similarity in final result can be seen.

In Quarles, Judge Butzner began (IV, Page 510) with a departmental structure which he found ". . . was organized on a racially segregated basis." Quarles, then found the division into department to be an original discrimination.

Here, the system wide division into railroad crafts, at Government order beginning in 1918, we find carries no such stigma of being an originally discriminatory device, though corrections in certain phases thereof to insure against discriminatory practices must be made.

Our review of "Legislative History of Titles VII and XI of the Civil Rights Act of 1964", as published by the United States Equal Opportunity Commission, all 700 pages of it, do give us pause, however, with Judge Butzner's appraisal of that legislative history and its influence on the meaning of Section 703(h). We believe the Congressional debates cover the railway seniority system as an intended benefactor of that section.

In short, we specifically find from our review of the evidence, the exhibits, and the record in Congress, that the employment practices of the C&O founded in system wide collective bargaining agreements which may apply different terms, conditions, or privileges of employment in some few instances, are pursuant to a bona fide seniority system, as contemplated under 703(h).